IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

COPPER RIVER & NORTHWESTERN RAILWAY COMPANY, a Corporation, and KATALLA COMPANY, a Corporation, *Plaintiffs in Error,* vs. JAMES HENEY, *Defendant in Error.*	No. 2300

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE TERRITORY OF ALASKA, THIRD DIVISION.

Brief of Plaintiffs in Error

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Brief of Plaintiffs in Error

This cause comes here on a Writ of Error sued out by the defendants below, to reverse a judgment rendered against said defendants in the court below, in an action at law for the recovery of damages for personal injuries alleged to have been sustained by plaintiff (defendant in error), by reason of the alleged negligence of defendants. For convenience in this brief, the parties will be referred to as designated in the court below.

The complaint (Record, pages 2-6) alleges that defendant, Copper River & Northwestern Railway Company is a Nevada corporation owning and operating, at all times mentioned, a line of railroad from Cordova, to and beyond Chitina, Alaska; that defendant, Katalla Company, is a New York corporation doing business in Alaska, and a subsidiary company of the Copper River & Northwestern Railway Company; that in operating its said line of railway the Copper River Railway Company transacts its business partly through the Katalla Company, which nominally employs and directs many of the men working on the railroad line; that neither plaintiff nor the general public know the precise functions of the Katalla Company, nor its relations to the Copper River & Northwestern Railway Company, but alleges on information and belief that the Katalla Company "is a mere agency of the said Copper River & Northwestern Railway Company, and the operations of said Katalla Company are in reality operations of the Copper River & Northwestern Railway Company, and the Copper River & Northwestern Railway Company is the real employer of men working on its said line in the operation and maintenance of the same."

The complaint further alleges that on January 19, 1912, "plaintiff was working *in the employ* of said Copper River & Northwestern Company, in the *nominal* employ and under the *nominal* direction of said Katalla

Company, *agent* of said Railway Company'' in the tunnel on the railway company's line east of Chitina; that he was ''lagging'' the sides of a timber structure over part of the tunnel where a cave-in had occurred; that in doing this work plaintiff and others worked upon a platform at the top of the tunnel proper; that the construction of said platform was incomplete and several gaps had been left in it, one extending across the entire width of the tunnel and about six feet of the linear projection thereof; that this gap or open space was negligently left be defendants without guard rails; that the tunnel was dark and defendants negligently failed to place lights adjacent to the gap, and failed to furnish lights to the men working in the tunnel, to be placed adjacent to the gap to warn persons of its location.

It is further alleged that about 3 o'clock in the afternoon of January 19, 1912, when the tunnel was getting darker because of the coming of night, defendants

> ''wilfully, negligently and wrongfully ran a locomotive drawing a train of cars through said tunnel, said locomotive leaving a dense volume of coal smoke and a suffocating quantity of coal gas in said tunnel still furter intensifying the darkness of the tunnel; that because of said smoke and gas in the tunnel at the place where plaintiff was working, plaintiff was wholly unable to see anything, and was unable to breathe without painful, suffocating and sickening inhalation of coal gas; that for the purpose of escaping from said smoke, gas and intense darkness of

> the tunnel at the place where he had been working, plaintiff walked slowly and cautiously toward the westerly entrance of sail tunnel, to reach which, the same being the only place of exit from said tunnel at that time, it was necessary to pass the said gaps and open space in said platform; that plaintiff proceeded with great care, endeavoring to feel his way, but being confused by the darkness and partially strangled by the inhalation of coal gas as aforesaid, he moved in a state of partial bewilderment, and while groping slowly along said platform he inadvertently stepped into the gap in said platform hereinbefore particularly described and fell to the floor of the tunnel,''

whereby he sustained the injuries complained of.

Defendants answered separately, each denying all the allegations of the complaint, except the fact of their incorporation, and each alleging affirmative defenses of assumption of risk, contributory negligence and negligence of a fellow servant (R., pp. 17-21). The affirmative defenses were denied in replies filed by plaintiff; and the issues as defined by the complaint, answers and replies, came on for trial before Honorable Peter D. Overfield, Judge of said Court, and a jury, on May 6, 1913. A verdict was rendered against both defendants for $2,125.00. Defendants filed a joint motion for a new trial, which was denied (R., pp. 195-198), and judgment was entered by the Court on the verdict in favor of plaintiff and against both defendants (R., pp. 207-208).

There is very little dispute as to the facts in the case,

and no dispute as to when and how plaintiff sustained his injuries and the extent thereof. No evidence was introduced to prove the allegations of the complaint that the engine was run through the tunnel "wilfully, negligently and wrongfully," nor do we understand any claim of negligence is predicated on running the engine through the tunnel, nor the manner in which it was done.

Neither was any evidence offered by plaintiff to sustain his allegation that he fell while walking toward the entrance of the tunnel "for the purpose of escaping from said smoke, gas and intense darkness of the tunnel at the place where he had been working." The undisputed testimony is that the place of entrance to the platform where plaintiff was working, was in the opposite direction from the open space through which plaintiff fell, which fact he well knew; and he walked toward this opening in order to place a timber in another opening in the platform between where he had been working and this opening; that he walked past the hole he was looking for, and into the large opening beyond. The only negligence which could be claimed under the evidence, is the failure to guard or light the opening into which plaintiff walked.

The defendant, Copper River & Northwestern Railway Company, is a corporation owning a line of railway from Cordova to and beyond the place where plaintiff was injured, all in Alaska, and this line of railway had been in operation for some time prior to the accident in ques-

tion, except when operation was stopped by accidents. At the time of the accident, the operation of the railway had been tied up between Cordova and Chitina for several weeks (R., pp. 142-145).

The defendant, Katalla Company, is a New York corporation organized for the purpose of constructing railways (R., p. 153), but expressly prohibited by its articles of incorporation from engaging in the business of a railway or transportation corporation (R., p. 156). This defendant constructed the railway line of the Copper River & Northwestern Railway Company, and the latter Company had been operating this railway for some six months to a year prior to the accident to plaintiff (R., pp. 147-151). All licenses for operating this railway were taken out by and in the name of the Copper River & Northwestern Railway Company (R., pp. 155,156).

Several months prior to plaintiff's accident there had been a cave-in in the tunnel on the railway line near Chitina, which the Katalla Company was repairing (R., pp. 2, 28, 30, 55, 114, 146, 154). The record does not show under what arrangement between the defendants the railway line was constructed or the repairs to the tunnel were being made. Plaintiff alleges that defendant, Katalla Company, was the agent of the Copper River & Northwestern Railway Company in making these repairs. The evidence certainly shows nothing more than such agency, or that the Katalla Company was an independent con-

tractor doing the work in question, either of which facts we think would be sufficient to require a reversal of this case as we will hereafter argue. In any event, while the evidence shows the Copper River & Northwestern Railway Company was a common carrier by railway in Alaska, it also shows that the Katalla Company was not such common carrier, but was merely a construction company.

Several months prior to plaintiff's accident a portion of the tunnel had caved in. Two and a half or three months prior to his accident, plaintiff went to work as foreman getting out the dirt from this cave-in (R., pp. 28, 60); he then spent seven or eight days in the woods cutting timber for the tunnel (R., p. 29), and then he went to work as a carpenter helping to re-timber the tunnel and fill in behind and above the walls and roof of the tunnel with wood and pieces of timber (R., pp. 61-63). He continued at this work for three weeks or a month before he was injured (R., pp. 26, 61).

The tunnel extended practically east and west. The east end being toward the Kennecott Mine and the west end toward Chitina and Cordova. The work of re-timbering the tunnel was commenced at the east end (R., p 63), and new timbers were put in for a distance of about 200 feet (R., p. 163), and the work was stopped from six to twelve feet from a few old timbers which were left standing at the west end of the tunnel (R., pp. 63, 164). This

re-timbering was two stories high (R., pp. 30, 63, 163), and across the top of the first story and about 20 or 21 feet above the railway tracks a floor was placed covering the entire width of the tunnel and the entire length of the new timbering, making this floor about 24 feet wide by 200 feet long. Plaintiff had assisted in all of this re-timbering of the tunnel (R., p. 63), and knew that the west end had not been completed (R., pp. 38, 39, 65-68, 73), and that the floor stopped some 6 to 12 feet from the old timbers at this end, leaving an open space down to the track 20 or 21 feet below, through which material was being hoisted up on to the platform where he was was working, for filling in holes in the floor between the timbers and for lagging the tunnel (R., pp. 64-67, 141, 166).

At the time of plaintiff's accident, he and three other carpenters were working on this platform. One of these carpenters was taking emasurements of holes in the platform between some of the timbers, which had not been filled up, and the other two of these men were sawing timbers to be placed in these holes (R., pp. 33-35, 43, 100, 127, 132, 133). Plaintiff was taking the timbers when sawed and filling in the holes they were intended for. A hole had been left in the platform some 50 feet east from where these timbers were being sawed, through which these men reached the platform by means of a ladder (R., pp. 42, 96, 102, 121, 128). Just prior to his accident, plaintiff was informed by the man who was taking the

measurements of the holes to be filled in, that he had measured a hole between the point where the timbers were being sawed and plaintiff then was, and the Chitina end of the tunnel where plaintiff fell, and suggested that plaintiff go back and put the timbers in this hole (R., p. 43). This man was not a foreman, nor was there any foreman on this work at this time (R., p. 38). Just before this statement was made to plaintiff, a train had gone through the tunnel, sending up large quantities of smoke and gas into the chamber of the tunnel where plaintiff was working, making it difficult for the men to see to work. Trains had been running through the tunnel several times a week, sending up more or less smoke and gas all the time plaintiff had been working on this platform (R., pp. 35, 79, 120).

When plaintiff first went to work on the platform there were a couple of carbide lights and some gasoline torches used for lighting the platform. Some time before the day of the accident, the carbide lights had been taken away for use at another place; and then the gasoline torches and hand lanterns were used to furnish light on the platform. A few days before the accident all available gasoline was exhausted. The railroad being blocked between Chitina and Cordova, no other gasoline could be obtained, and for several days the only lights the men working on this platform had were three hand lanterns (R., pp. 33, 100, 127). The two men who were sawing

timbers used one of these lanterns where they were working, the man who was taking the measurements used one of the lanterns, and plaintiff used the other lantern (R., pp. 44, 105, 109).

Some time prior to the accident, plaintiff and the other men working with him on this platform had been directed by Mr. Forrester, engineer in charge of this work, to go down outside the tunnel when a train went through and do work there until the tunnel was clear of smoke (R., pp. 36, 78, 104, 131, 143). Afterwards when these men had no work to do outside the tunnel, it was their practice when a train went through and threw up so much smoke that it was difficult for them to see to work, to stop work and either stand still or go over to the ladder leading to the lower part of the tunnel and go part way down that, and wait until the tunnel was free of smoke (R., pp. 36, 78, 118, 121). Sometimes when the men were wet from handling the timbers, and they did not care to go outside the tunnel or down below where it was colder, they would merely stand still and wait until the smoke had cleared out. They had no instructions to continue work while the tunnel was full of smoke, and, except as they had been instructed on previous occasions to go outside and do work which they had to do there, they used their own discretion as to what they would do, depending upon how much smoke was thrown up from the passing engine, and whether they preferred to go

down where it was colder or remain still where they were. This was their practice even when they had the carbide lights and gasoline torches. At the time in question, the engine, as was customary, whistled and rang its bell before entering the east end of the tunnel, several hundred feet from where plaintiff was working, and then proceeded very slowly through the tunnel (R., pp. 44, 80, 81, 122, 141). At this time it threw out considerable smoke and gas. This smoke and gas were coming up through the platform on which plaintiff was working at the time he was told that the timber was ready to be placed in the hole between himself and the Chitina end of the tunnel. Instead of either going down the ladder or standing where he was, until the smoke had cleared out of the tunnel so he could see where to go with the lantern, which was the only light he had, he started to walk toward the unfinished end of the tunnel to find the hole where this timber was to be placed (R., p. 44). He walked between two rows of timbers about four feet apart, carrying the lantern in his left hand and feeling his way along. The end of the platform toward which he was going was about 50 feet from where he started (R., pp. 42, 43, 96, 102). The hole he was going to find was half way between these two points (R., p. 82). He knew that there was no guard or rail at this end of the floor of platform, nor any light there, nor had he ever asked that a guard or rail or light be placed there nor complained of their absence, but ad-

mitted it would have been his duty to place the lantern there if one was necessary (R., pp.68-69). He had not placed any guard or rail across this end of the platform, although there was plenty of material with which to make such a guard or rail, if it was necessary (R., pp. 116, 125). For some reason, either because of the effect of the smoke and gas on him, or because he was careless, he walked past the hole he was looking for and stepped off the end of the platform falling to the track below, receiving the injuries of which he complains.

The negligence complained of is that defendant neglected to place a guard across this end of the platform, or to place a light there to show the men working on the platform where the edge of the floor was. He did not testify, as alleged in his complaint, that he was going toward this end of the tunnel to get out of the smoke and gas, and the evidence shows that there was no occasion for his going near this end of the tunnel, as the work he had to do at this time did not necessarily take him near this edge. While there is some evidence of other holes in the platform which had not been filled up, plaintiff did not fall through any of these other holes, and it was his duty to fill these holes up.

While no mention of the Federal Employers' Liability Act is made in the complaint, the allegations therein and evidence introduced by plaintiff were clearly intended to make a case under that Act. Plaintiff alleges

that the defendant, Copper River & Northwestern Company is a corporation, "owning and operating a line of railroad from Cordova, on the Gulf of Alaska, to and beyond the Copper River, directly east of the town of Chitina, all in the Territory of Alaska, and was such corporation at all times hereinafter mentioned." And plaintiff introduced evidence to show that defendant, Copper River & Northwestern Railway Company, for some time prior to plaintiff's accident, had been engaged in the business of a common carrier, carrying freight and passengers from Cordova to a point on the railway line beyond the tunnel in question; that it had obtained a license under the laws of Alaska, authorizing it to transact such business as a common carrier by railroad in Alaska (R., pp. 145-147, 150-155).

These allegations and this evidence were clearly for the purpose of showing that the Copper River & Northwestern Railway Company was a "common carrier by railroad" in Alaska, within Section 2 of the Act of Congress of April 22, 1908, known as the Federal Employers' Liability Act. On the other hand, there is no allegation in the complaint, and no evidence was introduced that the Katalla Company was such common carrier. In fact, the allegations of the complaint are that the Katalla Company was a mere agency of the Copper River & Northwestern Railway Company, for the purpose of doing a portion of its business, and the evidence goes no further

in any event, than to show that the Katalla Company was a mere construction company and making the repairs in question as such.

But we shall argue that it makes no difference whether or not the action was intended to be based upon the Federal Employers' Liability Act; that if the evidence shows that this Act would apply, then its provisions alone would govern the rights of plaintiff in this action.

At the close of plaintiff's evidence, each defendant moved the court for a non-suit in its favor, for the reasons that the action was based on the Act of 1908, and plaintiff had failed to establish that both defendants were doing a common carrier business, which fact it was necessary for him to establish because the Act takes away the common law liability, and actions under the statute and common law could not be joined; also because, plaintiff had failed to establish that he was employed by or working for either defendant, and that he knew the condition of the place where he fell, knew the tunnel was full of smoke and walked into the hole through the smoke, while the other employees working with him stood still, according to instructions given them (R., pp. 157-160). These motions were denied and exceptions duly taken and allowed (R., p. 156).

At the close of all the evidence, each defendant moved the court for a directed verdict in its favor, upon the grounds urged in the motions for non-suit, which mo-

tions were denied and exceptions duly taken and allowed (R., pp. 170, 174).

Thereupon, the court instructed the jury as to the law of the case. It first instructed them as to the "law applicable to the case, in the absence of special statutory provisions, which apply only to railroads as common carriers in Alaska" (R., p. 175). Later the court instructed the jury as to "the law as it exists on the same subject matter, when a defendant employer is a railroad common carrier, and an employee is injured while engaged as a servant in the service of such common carrier" (R., p. 175).

The court in these instructions did not tell the jury which rule of law would apply in this case, but did instruct them that

> "Before you can find either of the defendants a common carrier under the statutory provisions of Congress referred to as the Acts of 1906 and 1908, you must be convinced by the evidence that one or both was offering or holding itself or themselves out to carry goods and passengers for the general public when offered and tendered them and the price for so doing." (R., p. 180.)

Defendants requested the court to give the jury certain instructions, most of which requests were refused (R., pp. 186-194), to which refusal defendants excepted, and their exceptions were allowed (R., pp. 199-206).

After the verdict, defendants made a motion for a new trial for the following reasons:

I.

That the damages allowed by the jury were excessive and were given under the influence of passion and prejudice.

II.

That there was insufficiency ofevidence to justify the verdict and that the same is against the law.

III.

Error in law occurring at the trial and excepted to by the party making the application.

IV.

For the reason that the plaintiff based this action on the Acts of 1906, 1908 and 1910, commonly known as the Employers' Liability Act regardinging common carriers, that there was no evidence introduced in the case sufficient for the jury to find both the Copper River & Northwestern Railway Company and the Katalla Company were each or both doing a common carrier business, and that the verdict in this case was rendered against both the Copper River & Northwestern Railway and the Katalla Company, and that the evidence failed to show

that either of said defendants were connected in any way with each other in doing a common carrier or other business.

V.

For the further reason that the Court instructed the jury both under the common-law liability and the liability under the Acts of 1906, 1908 and 1910, commonly known as the Employers' Liability Act regarding common carriers; that the two remedies are separate and distinct, and that the plaintiff suing under the aforesaid Acts cannot recover under the common-liaw liability.

VI.

For the further reason that the plaintiff admitted that he was working for the Katalla Company on a platform that was without a guard-rail; that he knew at the time and for several days prior thereto that said platform did not have a guard rail on it, and knew the exact position and condition of the point or place where he claims he was injured and by which *he injured;* that the evidence further showed that he with three other co-workers working with him, no foreman being present, were performing work on the scaffold or platform, and that the plaintiff himself had at prior times, when trains were passing through the tunnel, gone down from this platform in order to avoid smoke from the trains, and on this

particular day and time this plaintiff, knowing that the tunnel was full of smoke, claims to have started from the place were he was standing to walk toward the end of the tunnel where he was injured for the purpose of putting down some braces; that the plaintiff admitted that the smoke was so thick that he was unable to see the floor and that he was walking to this point to put some braces on the floor; that all of the other men working with him admitted that they stood still at this time, they also admitted that they could not see and had received instructions before that when trains passed through the tunnel and the smoke ascended that they should remain still; that the plaintiff knowing the condition of the tunnel and knowing that it was impossible for him to perform the work which he claims he started to do, attempted to walk through the smoke and walked off the point or place where he claims there was no guard-rail, although he admits that he knew there was no guard-rail at this point at that time for several days prior thereto, and admits that there was sufficient lumber convenient which he could have used to put on a guard-rail.

The motion for a new trial was denied, to which ruling defendants excepted and their *exceptions* were allowed (R., p. 198).

The questions involved in this statement of facts and presented here by the Assignments of Error, together

with the manner in which these questions are raised upon the record, are as follows:

I.

Plaintiffs in error contend that it was the duty of the trial court to decide as a matter of law, whether this action was based upon a common law liability or upon a liability under the Federal Employers' Liability Act, and instruct the jury accordingly; that under the pleadings and evidence it appeared conclusively, that the defedant, Copper River & Northwestern Railway Company, was a common carrier by railroad in a Territory at the time of plaintiff's injury, within the terms of said Act, and therefore that plaintiff could only maintain this action against the Copper River Railway Company under this Act, after proving that he was injured while in that Company's employ; that under the pleadings and evidence it conclusively appeared that the defendant, Katalla Company, was not a common carrier by railroad at the time of plaintiff's injuries, within the terms of the Federal Act, and therefore, plaintiff could not maintain this action against the Katalla Company under that Act, but could only maintain this action against that Company under the common law; that plaintiff could not maintain this action against the defendants jointly, basing his right to recover against one defendant upon the statute, and against the other defendant upon the common law, nor

could he sue the defendants jointly, relying on both the common law and the statute, nor could the action be maintained under the pleadings and evidence against the defendants jointly, relying upon either the tsatute alone or the common law alone; that the joint judgment against the defendants cannot stand, under the pleadings and evidence in the case, and that the court erred in instructing the jury as to the rules of law applicable to an action based upon the common law, and also to an action based upon the statute, at least, without instructing the jury which rule applied in this case, or to which defendant the respective rules applied.

These questions are raised upon the record by the following Assignments of Error: IX, X, XXI, XXIII, XXVIII, XXXIV, XXXVII.

II.

Plaintiffs in error contend that even if their foregoing position is not correct, and that this action could be maintained against both defendants, then that the evidence wholly fails to show any cause of action or right to recover against either defendant, for the following reasons:

(a) No righ to recover against the Copper River & Northwestern Railway Company is shown because

1. Plaintiff did not show he was in the employ of this Company.

2. Plaintiff could only maintain the action against this Company under the Federal Act.

3. The evidence fails to show any negligence on the part of this Company, either under the common law or the statute.

4. If the action is based on the common law, the evidence shows as a matter of law, that plaintiff cannot recover because of his contributory negligence and assumption of the risks involved.

5. If the action is based on the statute, then the evidence shows, as a matter of law, that plaintiff assumed all the risks involved and he cannot recover.

(b) No right to recover against the Katalla Company is shown because

1. If plaintiff was in the employ of the Copper River & Northwestern Railway Company he was not also in the employ of the Katalla Company, and the latter Company was not his master, nor his fellow servant, nor liable to him upon any theory.

2. If plaintiff was in the employ of the Katalla Company, he could maintain this action against it only under the common law.

3. The evidence fails to sho wany negligence on the part of the Katalla Company, either under the common law or the statute.

4. If the action is based on the common law, the evidence shows, as a mater of law, that plaintiff cannot recover because of his contributory negligence and assumption of the risks involved.

5. If the action is based on the statute, then the evidence shows, as a matter of law, that plaintiff assumed all the risks involved and he cannot recover.

These questions are raised on the record by the following Assignments of Error: IX, X, XXIII, XXVIII, XXXVI, XXXVII.

III.

Plaintiffs in error contend that even if they are incorrect in all of their foregoing contentions, and the action could be maintained against both Companies under the pleadings and evidence in the case, nevertheless, the court committed numerous errors in the trial of the case in giving an drefusing to give instructions to the jury, which errors were highly prejudicial to both defendants, and because of which the judgment of the trial court should be reversed and a new trial granted.

These questions are raised upon the record by the following Assignments of Error: XII, XIII, XIV, XV, XVII, XVIII, XXII, XXIV,XXV, XXVI, XXIX, XXX, XXXI, XXXII, XXXIII, XXXIV, XXXV, XXXVI, XXXVII.

SPECIFICATION OF ERRORS RELIED UPON.

IX.

The Court erred in denying the Motion of the plaintiff in error made after the defendant in error rested his case, for a nonsuit of said action, which motion was as follows as to both defendants:

I.

"That this action is based on the Act of 1908, commonly known as the Employers' Liability Act, and the plaintiff has failed to establish that both defendants were doing a common carrier business. That in order for plaintiff to prevail in this action, having based his cause of action upon the aforesaid Act, it is necessary that he establish that both the Copper River & Northwestern Railway Company and Katalla Company were doing a common carrier business for the reason that the aforesaid Act takes away the common law liability and that they are separate and distinct laws which cannot be joined."

II.

"That the plaintiff has failed to establish that he was employed by or working for the Katalla Company at the time he received his injuries."

III.

"That the plaintiff has admitted that he was familiar with and knew the condition of the place where he stepped from and was injured. Has admited that at the time he was injured the tunnel was

full of smoke, the train had passed the point where he was standing and he walked into the smoke ahead of him and that all of the other employees working with him stood still according to instructions given them by the foreman."

IV.

"For the further reason that the plaintiff has failed to make out a case against these defendants."

X.

The Court erred in denying the motion of the plaintiff in error made at the close of the case for a Directed Verdict on behalf of both defendants to which defendants excepted and exception was allowed, which Motion was same as to both defendants and was as follows:

I.

"That this action is based on the Act of 1908, commonly known as the Employers' Liability Act, and the plaintiff has failed to estabilsh that both defendants were doing a common carrier business. That in order for paintiff to prevail in this action, haveing based his cause of action upon the aforesaid Act, it is necessary that he establish that both the Copper River & Northwestern Railway Company and Katalla Company were doing a common carrier business, for the reason that the aforesaid Act takes away the common-law liability and that they are separate and distinct laws which cannot be joined."

II.

That the plaintiff has failed to establish that he was employed by or working for the Katalla Company at the time he received his injuries."

III.

"That the plaintiff has admitted that he was familiar with and knew the condition of the place where he stepped from and was injured. Has admitted that at the time he was injured the tunnel was full of smoke, the train had passed the point where he was standing and he walked into the smoke ahead of him and that all of the other employees working with him stood still according to instructions given them by the foreman."

IV.

"For the further reason that the plaintiff has failed to make out a case against this defendant."

XI.

The Court erred in giving the following instruction to which plaintiffs in error duly excepted and its exception was allowed:

"I will first proceed to give you the law applicable to the case, in the absence of special statutory provisions which apply only to railroads as common carriers in Alaska, and later give you the law as it exists on the same subject matter, when a defendant employer is a railroad common carrier, and an employee is injured while engaged as a servant in the service of such common carrier."

XII.

The Court erred in giving the following instruction, to which plaintiffs in error duly excepted and its exception was allowed.

"You are instructed that the rule of law is that between master and servant the master is liable for all accidents occurring in the course of the employment which are not induced by the carelessness or improper conduct of the employee or servant."

XIII.

The Court erred in giving the following instruction, to which plaintiffs in error duly excepted and its exception was allowed.

"In other words, the master is bound to use reasonable care and diligence to prevent accident or injury and if he does not he will be responsible for the damages, unless the servant assumed the risk or contributed to the injury through his own negligence, or the negligence of a fellow-servant."

XIV.

The Court erred in giving the following instruction, to which plaintiffs in error duly excepted and its exception was allowed.

"As between master and servant negligence should be measrued by the character and risk of the business engaged in and the degree of care of both master and servant is higher when the lives and limbs are endangered than in ordinary cases."

XV.

The Court erred in giving the following instruction,

to which plaintiffs in error duly excepted and its exception was allowed.

> "All acts and duties which the master is bound to perform toward his employees and servants, which he delegated the performance of to others as an agent, then the agent occupies the same place as the master and the master is deemed present and liable for the manner in which such duties are performed."

XVII.

The Court erred in giving the following instruction, to which plaintiffs in error duly excepted and its exception was allowed.

> "You are instructed that the servant does not assume the extraordinary or unusual risks of the employment but on accepting employment he does assume all the ordinary and usual risks and perils incident thereto, whether it be dangerous or otherwise, and also all risks which he knew of or may have known in the exercise of reasonable care, except that he does not assume such risks as are created by the master's negligence."

XVIII.

The Court erred in giving the following instruction, to which plaintiffs in error duly excepted and its exception was allowed.

> "Where the negligence or want of ordinary care and caution of a servant so far contributed to his injury that it would not have occurred but for such

negligence, he cannot as a rule recover. But if the injruy is caused by the gross or wilful negligence of the master or his agents, or if the consequences of the servant's negligence might have been avoided by the exercise of ordinary and reasonable care on the part of the master or his agents, then the servant could recover though himself negligent."

XIX.

The Court erred in giving the following instruction, to which plaintiffs in error duly excepted and its exception was allowed.

"All servants engaged in the same common work, without any dependence upon or relation to each other, except as co-laborers without rank, under the direction and management of the master, or his agents, are fellow-servants."

XX.

The Court erred in giving the following instruction, to which plaintiffs in error duly excepted and its exception was allowed.

"To render the master not ilable for an injury to a servant caused by the negligence of a fellow-servant, it must be shown that the injury directly resulted by reason of such fellow-servant's negligence, that is, that it was the proximate cause thereof and not the negligence of the master."

XXI. --

The Court erred in giving the following instruction, to which plaintiffs in error duly excepted and its exception was allowed.

> "That every common carrier engaged in commerce in the Territories * * * shall be liable in damages to any person suffering injury while he is so employed by such carrier in any of asid territories, for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track roadbed, works, boats, wharves or other equipment."
>
> "That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this Act, to recover damages for personal injuries to an employee, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

XXII.

The Court erred in giving the following instruction, to which plaintiffs in error duly excepted and its exception was allowed.

> "This is your last case at this term of court, of which you have had several on the same general subject of personal injuried."

XXIII.

The Court erred in refusing to give to jury the following instruction requested by plaintiffs in error, which was duly excepted to, and exception allowed, which instruction was as follows:

> "You are instructed that the defendants, Copper River & Northwetsern Railway Company and the Katalla Company have plead separately in this action and in order for you to find a verdict against either of the defendants, Copper River & Northwestern Railway Company and the Katalla Company, you must first find from the evidence that the plaintiff was working for either the Katalla Company or the Copper River & Northwestern Railway Company or both and if the evidence fails to show that the plaintiff was working for the Katalla Company, then you are instructed that the plaintiff cannot recover against the Katalla Company and you are futrher instructed that if the plaintiff fails to show from the evidence that he was working for the Copper River & Northwestern Railway Company, then you are instructed that he cannot recover against the Copper River & Northwestern Railway Company."

XXIV.

The Court erred in refusing to give to jury the following instruction requested by plaintiffs in error, which was duly excepted to, and exception allowed, which instruction was as follows:

> "You are instructed that if you find from the

evidence that the plaintiff had been warned that when trains were passing through the tunnel that he should quit work and either come down from the roof of the tunnel or not move around and he failed or refused to obey said orders and he would not have been injured if he had obeyed said orders and he was injured by refusing to obey said order, then you are instructed that the plaintiff cannot recover in this action."

XXVI.

The Court erred in refusing to give to jury the following instruction requested by plaintiffs in error, which was duly excepted to, and exception allowed, which instruction was as follows:

"You are instructed that the plaintiff is presumed to know the dangers that he has an opportunity to observe and that the must inform himself of open, obvious risks and if he does not do this and is injured by reason of his failure to do so, then he cannot recover."

XXVII.

The Court erred in refusing to give to jury the following instruction requested by plaintiffs in error, which was duly excepted to, and exception allowed, which instruction was as follows:

"You are instructed that if the plaintiff continued working with knowledge actual or constructive of dangers which an ordinary prudent man

would refuse *or* subject himself to, he is guilty of contributory negligence and cannot recover."

XXVIII.

The Court erred in refusing to give to jury the following instruction requested by plaintiffs in error, which was duly excepted to, and exception allowed, which instruction was as follows:

"You are instructed that if you find that the Katalla Company was not doing a common carrier business at the time that the plaintiff was injured, and doing a common carrier business over that portion of the railroad line upon which the plaintiff was working and at the place where he was injured, you are instructed that the plaintiff cannot recover in this action."

XXIX.

The Court erred in refusing to give to jury the following instruction requested by plaintiffs in error, which was duly excepted to, and exception allowed, which instruction was as follows:

"You are instructed that plaintiff has admitted in this case that he was working as a cerpenter at the time of his injury and that he was familiar with and knew that at the place where he fell over had no guard-rail across it, which fact was known to him for several days prior to the accident and at the time of the accident, therefore you are instructed that if the plaintiff continued working with knowledge of these facts as he has testified that he did have and if

you further find that he knew or ought to have known as a reasonable prudent man that it was dangerous not to have a guard-rail at this palce and no one in authority had promised to have a guard-rail or other protection at this place, then you are instructed the plaintiff assumed the risks incident to no guard-rail being at the point or place where he fell."

XXX.

The Court erred in refusing to give to jury the following instruction requested by plaintiffs in error, which was duly excepted to, and exception allowed, which instruction was as follows:

"You are instructed that plaintiff has admitted in this case that he was working as a carpenter at the time of his injury and that he was familiar with and knew that at the place where he fell over had no guard-rail across it, which fact was known to him for several days prior to the accident and at the time of the accident, therefore you are instructed that if the plaintiff continued working with knowledge of these facts as he has testified that he did have and if you further find that he knew or ought to have known as a reasonable prudent man that it was dangerous not to have a guard-rail at this palce and no one in authority had promised to have a guard-rail or other protection at this place, then you are instructed that the plaintiff assumed the risks incident to no guard-rail being at the point or place where he fell and cannot recover in this case."

XXXI.

The Court erred in refusing to give to jury the following instruction requested by plaintiffs in error, which was duly excepted to, and exception allowed, which instruction was as follows:

> "You are instructed that the palintiff has admitted that he knew at the time of his accident and for several days prior thereto that there was no guard-rail or other protection at the point or place where he fell, and has admitted that he knew that trains were running through this tunnel and that smoke from the engines surrounded the place where he was working, and that while he was surrounded by smoke from the engine he voluntarily continued working when he knew that he could not see where he was walking and that he did proceed and while walking stepped off of the point or place where he claims there was no guard-rail; therefore you are instructed that the plaintiff assumed the risks of walking or trying to work at that time."

XXXII.

The Court erred in refusing to give to jury the following instruction requested by plaintiffs in error, which was duly excepted to, and exception allowed, which instruction was as follows:

> "You are instructed that the plaintiff has admitted that he knew at the time of his accident and for several days prior thereto that there was no guard-rail or other protection at the point or

place where he fell and has admitted that he know that trains were running through this tunnel, and that smoke from the engine surrounded the place where he was working and that while he was surrounded by smoke from the engine he voluntarily continued working when he knew that he could not see where he was walking and that he did proceed and while walking stepped off of the point or place where he calims there was no guard-rail; therefore you are instructed that the plaintiff assumed the risk or walking or trying to work at that time, and he is guilty of contributory negligence."

XXXIII.

The Court erred in refusing to give to jury the following instruction requested by plaintiffs in error, which was duly excepted to, and exception allowed, which instruction was as follows:

"You are instructed that the plaintiff has admitted that he knew at the time of his accident and for several days prior thereto that there was no guard-rail or other protection at the point or place where he fell and has admitted that he knew that trains were running through this tunnel and that smoke from the engines surrounded the place where he was working and that while he was surrounded by smoke from the engines he voluntarily continued working when he knew that he could not see where he was walking and that he did proceed and while walking stepped off of the point or place where he claims there was no guard-rail; therefore you are instructed that the plaintiff assumed the risks of

walking or trying to work at that time, and he cannot recover in this case."

XXXIV.

The Court erred in refusing to give to jury the following instruction requested by plaintiffs in error, which was duly excepted to, and exception allowed, which instruction was as follows:

"You are instructed that the plaintiff admitted that he was working while he claims the tunnel or place of work was not sufficiently lighted for several days. You are instructed that if the plaintiff knew this and continued at work, that the plaintiff assumed the risks incident to his employment by reason of the fact that the tunnel was not sufficiently lighted."

XXXV.

The Court erred in refusing to give to jury the following instruction requested by plaintiffs in error, which was duly excepted to, and exception allowed, which instruction was as follows:

"You are instructed that the plaintiff admitted that his general work was that of assisting in retimbering and strengthening the tunnel for the purpose of making same safe. You are therefore instructed that the plaintiff assumed all of the risks of employment in his work of retimbering and strengthening said tunnel."

XXXVI.

The Court erred in refusing to give to jury the following instruction requested by plaintiffs in error, which was duly excepted to, and exception allowed, which instruction was as follows:

> "You are instructed that this case is based upon the Acts of 1906 and 1908 regarding common carriers. You are instructed that before the plaintiff can recover in this case he must prove by the preponderance of evidence that both of the defendants were common carriers and unless you so find, the plaintiff cannot recover in this action."

The Court erred in denying the motion of defendants (plaintiffs in error) for a new trial herein, and its order and judgment overruling said motion and granting judgment in favor of plaintiff and against said defendants for the amount of the verdict found by the jury in favor of plaintiff with costs; which order and judgment were duly excepted to by the defendants and exception allowed by the Court. Said motion was based on all the files, records and proceedings herein and was made upon the following grounds specified therein and on each thereof, to-wit:

Comes now the defendant, Copper River & Northwestern Railway Company and Katalla Company, and moves the Court for a New Triel in this action for the following reasons:

I.

"That the damages allowed by the jury were excessive and were given under influence of passion and prejudice."

II.

"That there was insufficiency of evidence to justify the Verdict and that the same is against the law."

III.

"Error in law occurring at the trial and excepted to by the party making the application."

IV.

"For the reason that the plaintiff based this action on the Acts of 1906, 1908 and 1910, commonly known as the Employers' Liability Act regarding common carriers, that there was no evidence introduced in this case sufficient for the jury to find that both the Copper River & Northwestern Railway Company and the Katalla Company were each *of* both doing a common carrier business, and that the verdict in this case was rendered against both the Copper River & Northwestern Railway Company and the Katalla Company, and that the evidence failed to show that either of said defendants were connected in any way with each other in doing a common carrier or other business."

V.

"For the further reason that the Court instructed the jury both under the common-law liability and the liability under the Acts of 1906, 1908 and 1910, commonly known as the Employers' Liability Act, regarding common carriers; that the two remedies are separate and distinct and that the plaintiff suing under the aforesaid Acts cannot recover under the common law liability."

VI.

"For the further reason that the plaintiff admitted that he was working for the Katalla Company on a platform that was without a guard-rail; that he knew at the time and for several days prior thereto that said platform did not have a guard-rail on it and knew the exact position and condition of the point or place where he claims he was injured and by which he was injured; that the evidence further showed that he with three other coworkers working with him, no foreman being present, were performing work on the scaffold or platform and that the plaintiff himself had at prior times, when trains were passing through the tunnel, gone down from this platform in order to avoid smoke from the trains, and on this particular day and time this plaintiff knowing that the tunnel was full of smoke, claims to have started from the place where he was standing to walk toward the end of the tunnel where he was injured, for the pur-

pose of putting down some braces ;that the plaintiff admitted that the smoke was so thick that he was unable to see the floor and that he was walking to this point to put some braces on the floor, that all of the other men working with him admitted that they stood still at this time; they also admitted that they could not see and had received instructions before that when trains passed through the tunnel and the smoke ascended that they should remain still; that the plaintiff knowing the condition of the tunnel and knowing that it was impossible for him to perform the work which he claims he started to do, attempted to walk through the smoke and walked off the point or place where he claims there was no guard-rail, although he admits that he knew there was no guard-rail at this point at that time and for several days prior thereto and admits that there was sufficient lumber convenient which he could have used to put on a guard-rail."

ARGUMENT.

This Joint Action Cannot Be Maintained.

We content that this action against the defendants jointly cannot be maintained. The action against these defendants must be based either upon the Federal Employers' Liability Act or common law. It cannot be maintained against either defendant based upon both the statute and common law. If the Act applies to either defendant, it "supersedes all other common law and statutory liability on the part of such common carriers to such employees,"

De Aitley vs. C. & O. R. Co., 201 Fed. 591.

See also

Kelly's Administrator vs. C. & O. R. Co., et al, 201 Fed. 620;

Michigan Central R. Co. vs. Vreeland, 45 Sup. Ct. Dec., February 15, 1913, page 192;

Adam Express Co. vs. Crominger, U. S. Sup. Ct. Dec., February 15, 1913, page 148;

Winfree, etc. vs. N. P. R. Co., U. S. Sup. Ct. Dec., March 15, 1913, page 273;

Second Employers' Liability Cases, 223 U. S. 1.

If the Act applies to one defendant and not to the other, then an action against one defendant based on the Federal Act could not be joined with an action against the other defendant based on a common law liability.

The case of *Kelly's Administrator vs. C. & O. R. Co., et al, supra,* was an action for damages for death, brought against the Railroad Company and its employee, who was alleged to have been negligent in the matters complained of. The court held that the action could be maintained against the Railroad Company only under the Federal statute, and against the individual defendant only under the common law, because it is "limited to common carriers engaged in interstate commerce, and he is not such," the court saying:

> "What we have here, then, is two causes of action joined together in the same suit, one against the corporate defendant under the National Statute, and one against the individual defendant under the State Statute, and it may be accepted that they are improperly joined."

That this ruling is correct would seem to require no argument. It follows therefore, that in order to maintain this joint action, the liability of both defendants must be based either on the statute or on the common law, and cannot be based as to both defendants on both the statute and common law, or as to one defendant on the statute and as to the other defendant on the common law. It is, therefore, necessary to determine upon which ground each defendant is liable, if at all.

The complaint alleges that the Copper River & Northwestern Railway Company is a Nevada corporation,

"owning and operating a line of railroad from Cordova on the Gulf of Alaska, to and beyond the Copper River, directly east of the town of Chitina, all in the territory of Alaska, and was such corporation at all time hereinafter mentioned"; that the Railway Company "in operating such line of railroad" transacted part of its business through the Katalla Company, and that the Railway Company "is the real employer of men working on its said line in the operation and maintenance of the same" (R., pp. 2 and 3). Plaitniff introduced evidence showing that the Railway Company had operated the railroad for more than six months prior to the accident in question, as a common carrier of freight and passengers from Cordova to and beyond the place in question; also that the Railway Company had obtained a license under the laws of Alaska, for operating this railroad as such common carrier (R., pp. 145-147, 150-154). This evidence was not disputed, and we think it showed conclusively, for the purposes of this case, that the Copper River & Northwestern Railway Company was a common carrier by railroad in Alaska within Section 2 of the Act of 1908. While the evidence also showed that for some time prior to the accident to plaintiff, the roadroad was not being operated between Cordova and Chitina because of a snow blockade, we do not think this sufficient to take the Company out from the statute during this time.

The evidence also showed without dispute that plaintiff was engaged in making repairs upon a tunnel used by the Railway Company in its business as such common carrier, and this we think, brings plaintiff within the terms of the statute, provided he was employed by the Copper River & Northwestern Railway Company. These two facts appearing without dispute, if the Railway Company is liable at all, it must be by virtue of the Federal Statute only.

Nor was it necessary for plaintiff to expressly allege and rely on the statute. If the facts alleged and proven show that the statute applied, then the rights and liabilities of the parties depending upon that statute, whether plaintiff relied upon the statute in his complaint or not.

> "True, it is not distinctly alleged in the declaration that the action is based upon the Second Employers' Liability Act; but we think this effect must be given to the averments of the declaration that deceased met his death while in the employ of the company and while it was engaged in inter-state commerce. Such averments rendered the federal act alone applicable, and, further, the case was tried and disposed of below upon that theory."

Garrett vs. L. & N. R. Co., 197 Fed. 715.

See also

Smith vs. D. & T. S. L. R. Co., 170 Fed. 566;
Conard vs. A. T. & S. F. R. Co., 173 Fed. 531;
Erie R. Co. vs. White, 187 Fed. 356;

McChesney vs. Illinois Central Ry. Co., 197 Fed. 85;

Kelly's Administrator vs. C. & O. R. Co., *supra*.

On the other hand, the complaint alleged that the Katalla Company "nominally employs and directs many of the men working on said railroad line," and "is a mere agency of said Copper River & Northwestern Railway Company, and the operations of said Katalla Company are in reality operations of the Copper River & Northwestern Railway Company, and the Copper River & Northwestern Railway Company is the real employer of men working on said line in the operation and maintenance of the same." Also that plaintiff at the time of his injury was "in the nominal employ and under the nominal direction of said Katalla Company, agent of such Railway Company as aforesaid."

No evidence was offered tending to show that the Katalla Company was engaged in commerce as a common carrier by Railway, at least for many months prior to the accident in question; while the evidence did show that the Articles of Incorporation of the Katalla Company prohibited it from acting as such common carrier (R. p. 196). The evidence offered as to the ownership of the railway line was that the Copper River & Northwestern Railway Company owned and operated the line, while the Katalla Company was a mere construction company acting at most, as agent for the Railway Company, as al-

leged in the complaint (R., pp. 145-147, 150-154). To state a cause of action against the Katalla Company under the Federal Statute, it was necessary for plaintiff to prove that this Company was a common carrier by railroad in Alaska, which he neither alleged nor attempted to prove, but expressly alleged and proved that it was not. Therefore, under the very terms of the statute and all the decisions thereunder, no recovery could be had in this action against the Katalla Company under the Fedearl Statute. It follows that this joint action could not be maintained, and as objection was at all times made on this ground, the joint judgment cannot be sustained.

The Act "is in derogation of the common law and must be strictly construed."

Fulghan vs. Midland Valley Co., 167 Fed. 660;
Johnson vs. S. P. R. Co., 196 U. S. 1.

The Act is available only when two facts appear: First, the offending carrier must at the time of injury be "engaged in commerce between any of the several states, etc."; and, Second, the injury must be suffered by an employee "while he is employed by such carrier in such commerce." Both these facts must be present or the Act does not apply—the carrier must be actually engaged in interstate commerce, and the employee must also be taking part therein.

Pederson vs. D. L. & W. R. Co., 184 Fed. 739.

While this case was reversed by the Supreme Court of the United States, it was on other grounds, and the rule above stated was recognized as correct; the same rule has been recognized in all of the decisions arising under this Act.

It is apparent from the court's instructions that he considered all these questions as questions of fact to be decided by the jury, and accordingly he instructed them as to the rules of law applicable to the case in the absence of the Federal statute, and also the law applicable if the statute applied; but he did not tell the jury which rule of law would govern, nor even tell them that if they found the defendants, or either of them, to be common carriers by railroad, the law under the statute as given them, would apply, while if they did not find either or both defendants to be such carriers, then the common law rules would apply. Thus, the court instructed the jury on two entirely different theories of law, and left them to determine which should be followed, and how to apply that rule.

It is certainly unnecessary for us to cite authorities that it was the duty of the court to decide which rule of law apllied in this case, and then tell the jury what that rule is, especially a sthe facts are undisputed. Even if it were permissible for the trial court to tell the jury what the rule at common law is, as a matter of mere informa-

tion, or to aid the jury in understanding the rule under the statute, still this should only be done when followed by express instructions that the common law rule was not applicable and that the jury must follow the rule under the statute. On the other hand, if the common law rule applied, then of course, it would be entirely improper to instruct them as to the rule under the statute.

It is certain that the jury in this case were given no instructions as to what rule of law to follow, but were left confused as to what the law of the case is, having a right to assume that the court itself did not know which rule to apply. The court's attention was sepcifically called to these matters repeatedly, by motions for nonsuit, for directed verdict, by objections to instructions, requests for instructions and a motion for a new trial, and it would seem to us too clear for argument that a verdict against the defendants, after such instructions, cannot stand.

NEITHER DEFENDANT IS LIABLE UNDER EITHER THEORY OF THE LAW.

Even if we are not correct in the foregoing position, nevertheless, we contend that the judgment is not sustained against either defendant by the evidence in this case. Before plaintiff could recover against either defendant, he was obliged to prove that he was in the employ of that defendant. The complaint alleges that plaintiff was in the "nominal" employ of the Katalla Company as *agent* for the Railway Company, which was his *real* employer. He introduced evidence in an attempt to prove these allegations. Plaintiff testified that he was paid by the Katalla Company (R., pp. 30, 55), and that he was working under Engineer Forrester, who worked for the Katalla Company (R., pp. 55, 146). The other men working with plaintiff did not know which Company they were working for. They merely knew that they were working on the railway line (R., pp. 114, 126, 134, 135). This evidence does not even tend to prove that plaintiff was in the nominal employ of the Katalla Company. It certainly is not enough to prove that plaintiff was in the employ of the Copper River & Northwestern Railway Company, or if it shows this fact, then it also shows that he was not in the employ of the Katalla Company. It cannot be said from this evidence that plaintiff

was in the employ of both companies, and that both owed him a duty as his master.

But if plaintiff was in the employ of the Railway Company, then he could recover against that Company only under the Federal statute, as we have before shown; while if he was in the employ of the Katalla Company, he could recover against that Company only under the common law. However, we do not think he could recover against either company, no matter which one employed him, and owed him a duty as master.

In the first place, we do not think it could be seriously contended that plaintiff could recover against either Company under the common law. His master, whether one Company or the other, owed him a duty to use reasonable care and precaution to provide a reasonably safe place in which to perform his work. This was not an absolute duty, because a master is not an insurer on that score, but is required to exercise reasonable care and forethought to provide such a place as is reasonably safe for the servant's work. Where the master has done this, he has discharged his duty to his employee and is not guilty of any negligence in that regard.

Pacific T. & T. Co. vs. Starr, 206 Fed. 157, 162.

In this case plaintiff was working upon a floor or platform about 24 feet wide and 200 feet long. While there were a few small holes in this platform which had

not yet been filled, and which it was plaintiff's duty to fill, nevertheless, he did not fall in any of these holes, and there were no defects in the platform. The re-timbering of the tunnel was commenced at the east end, being the end farthest from the place plaintiff fell, and the work of re-timbering, and flooring over the top of the tunnel was carried on toward the west end. This work was completed at the east end and the end of the floor filled up (R., p. 163.) It fact, it appears that most of the work of re-timbering and lagging the tunnel was completed. A few of the old bents of the tunnel, which had not caved in, were still standing at the west end, occupying a space of some 20 to 30 feet from that portal of the tunnel.

When the new timbering and platform reached this point, it was stopped some six feet from these old bents, and this opening of from six to twelve feet clear across the tunnel was left for the purpose of raising timbers, lagging, etc., up on to this platform, to be used in completing the work above (R., pp. 64-67, 141, 166). Plaintiff had been engaged in assisting in all of this work for nearly a month. He says he assisted generally in the work of re-timbering the tunnel. While he did not personally put up these last new bents, or lay this last new floor, nevertheless, he was working in and about this tunnel during all of this time and knew exactly its condition and the purpose for which it was left in that condition (R., pp. 38, 39, 65-68, 73). No guard-rail was

placed across this end of the platform or floor in the tunnel, which fact plaintiff also knew. He now complains that the failure to place this guard or rail across this end of the tunnel was negligence on the part of his employer, because it rendered the place where he was working unsafe. We think the court will say, as a matter of law, that there was no negligence on the part of either defendant in not placing a guard or rail across this end of the platform. As well might a carpenter working on a flat roof complain that no guard or rail was placed around the edge of the roof. In fact, there would be more reason to require a guard or rail around a small roof near the edges of which the carpenters on the roof would be obliged to work, than to require a guard or rail across the end of this platform 200 feet long by 24 feet wide, and near which plaintiff was not required to be in performing any of his work.

The rule requiring a safe place for an employee to do his work in does not require the employer to make every place about his premises near which an employee has no occasion to go, or be in the performance of his work, so safe and secure that the employee cannot be injured if he goes where he ought not and need not go. It only requires the places near which the employee is required to be while in the performance of his work, or the places near which he is obliged to go in coming to and going from his work, to be kept in a reasonably safe condition.

In this case, the place of entrance to and exit from this platform was not, and had not been at this end of the platform, but it was some 50 feet toward the other end from where plaintiff was working. The place where plaintiff and the other men on the platform were working was about 50 feet from this end of the tunnel, and the hole which plaintiff started to fill in was nowhere near this end of the tunnel. Plaintiff's employer had no reason to anticipate that any of the men on this platform would ever get near this end of the tunnel, unless it was when they went there to get material which was hoisted up from below no to the platform at this point.

Furthermore, the evidence does not show that it was practicable to place a guard or rail across this end of the tunnel. This hole was left, as we have stated, so that material might be hoisted on to the platform at this point, and this could not be done if a guard or rail was placed across this end.

Again, the unguarded condition of this end of the platform was, for the time being, a permanent condition well known to plaintiff, and, in the absence of a statute requiring such an opening to be guarded, there was no negligence on the part of the master in not guarding the same, especially when it is left in this condition for the purpose of doing its work, and was not near the place where its employees are required to work, nor where arey

are required to go in doing such work, and where such condition was well known to them.

In the case of *Anthony vs. Leeret et al,* 12 N. E. 561, (N. Y.), plaintiff was injured by falling through a trap-door, but the existence of which he well know. The Court of Appeals of New York in discussing the obligation of the master toward plaintiff with reference to this door says:

> "The location of the trap-door in the passage-way was not *per se* a wrongful act. The defendants had a right to arrange their own premises in any way which suited their convenience, and were not bound to change the arrangement to secure greater safety to the employees. If the trap-door was not open to observation, or its existence was not known to those whose duty required them to use the passage-way, or if the defendants had omitted to give proper instructions to those employed in the planing-room, a different question would be presented."
>
> "It is true the master is under obligation to furnish a reasonably safe and convenient place for his servants to wor kin, and reasonably safe appliances for them to use in the performance of their work; but he is not an insurer against accidents, nor is he called upon so to construct every part of his premises as to prevent the possibility of accident thereon."
>
> *McCann vs. Atlantic Mills,* 40 Atl., p. 500 (R. I.)
>
> "There is no absolute duty on the part of an employer to box his machinery (Citing authorities).

And, under the circumstances of the case, there was no duty on the part of the employer to instruct the plaintiff that the coupling on the shaft was not boxed. The fact was obvious, and it must be assumed that he could see the condition of things. When the dangerous character of the machinery is in plain sight, a workman, ordinarily, must take notice, and no duty rests on the employer to point this out."

Murphy vs. American Rubber Co., 34 N. E. 268 (Mass.).

"So far as risks are obvious, partaining to the apparently permanent features of the business as it is openly conducted, an employer has a right to believe that his employee agrees to assume them. They are therefore not included among those to be guarded against in the performance of his general duty to furnish reasonably safe appointments for the employee, and the employer cannot be held guilty of negligence in failing to make provision against them."

Murch vs. Thos. Wilson's Sons & Co., 74 N. E. 111 (Mass.)

"It is not negligence upon the part o fthe master to lay out a particular mode of doing his work, or to furnish therewith particular appliances for doing his work, where neither such more nor such appliances are inherently or latently dangerous. When the employee knowing of such mode and of such appliances enters the service and continues in the service of his employer, he assumes the ordinary risks of such service arising from such mode which he knows by ordinary observation, and from such appliances, which are simple in their construction,

and not worn out, broken, or defective."

Ladwig vs. Jefferson Ice Co., 124 N. W. 407, 410 (Wis.)

Under the evidence in this case we think it appears conclusively, as a matter of law, that neither defendant was negligent in not placing a guard or rail across the end of the platform from where plaintiff fell.

The other ground of negligence claimed is that defendants failed to furnish proper lights on this platform. The evidence shows that some time prior to the accident, carbide lights with reflectors were used, which would give very strong light upon the platform, except when trains went through and the smoke was dense, and at such times even the carbide lights would not light the platform to any great extent. (R., p. 131). It also appears that when these carbide lights were used the reflectors were turned so the lights were thrown away from this end of the platform (R., p. 101) and upon the part of the platform where the men were working. These lights therefore, never were intended to, nor did in fact, indicate this unguarded edge of the floor, and even if they had been on the platform at the time in question, and had been used as they were ordinarily used, they would not in any way have prevented the accident. It also appears that when the gasoline torches were used, they were not placed at this end of the platform, nor used for the purpose of showing where this edge was, but were

used where the men were working at their places along the tunnel. Even when they were used, they gave very little light when the tunnel was filled with smoke from passing engines, therefore, their absence did not in any way contribute to plaintiff's injury.

Plaintiff was furnished a hand lantern to use in doing his work, lanters being the only lights furnished the men on the platform for several days prior to the accident. No complaint was made that they were not sufficient, and no request was ever made that any lantern or light be placed at the edge of the platform. These lanters were certainly sufficient to show the edge of the platform, when carried by a person walking toward the edge, unless the smoke was too dense, and in that event, a light at the edge of the platform would have been no better than the one plaintiff carried. If this lantern was not sufficien to properly light the platform at this time, so as to make it safe for plaintiff to walk toward this unguarded end, then he should have followed the practice theretofore followed by the men working on the platform, of standing still and waiting until the smoke cleared out, instead of blindly groping along through the smoke to the edge he knew was open. It was certainly no negligence on the part of the defendants in not assuming that he might start to walk through the dense smoke toward this open end without a proper light, and be injured, so that they were negligent in not guarding against such an act. We

think that under the well settled rules of law and the undisputed evidence in this case, no negligence against the defendants can be predicated on their failure to furnish other light than the lanterns which were furnished.

It is alleged in the complaint that the defendants "willfully, negligently and wrongfully" ran the engine through the tunnel while plaintiff was working. But there is no testimony to sustain this allegation. The engine was not run through the tunnel "wilfully," and it ran through in the same way it had been running through several times a week during all the time plaintiff was working on the platform. Before entering the tunnel it whistled and rang the bell to warn the persons working there it was coming, and then proceeded through at about six miles an hour, so slowly that the witness Likits, who was standing on the bottom of the tunnel just about this opening, had time to walk to the end of the tunnel and back again after hearing the engine whistle, and before it reached him (R., pp. 138, 139, 142). This witness was at this time sending up timbers and lumber on to the platform above, at the opening where plaintiff fell (R., p. 141). While it is true the engine at this time threw out considerable smoke, there is no evidence that it threw out more than it did on numerous other occasions, and no claim of negligence in the running of the engine through

the tunnel, or the way it which it was run through can be made in this case.

But even if there is sufficient evidence in the case to go to the jury on the question of the negligence of either defendant, still we do not think it can be contended that under the common law plaintiff could recover under the evidence in this case, because he assumed all the risks of injury from falling off this open end, the unguarded and unlighted condition of which had been well known to him for a long time, and also because of his own negligence in walking toward that end through the dense smoke, with only the hand lantern which had been furnished him. The evidence shows that the other workmen on the platform had been told by Mr. Forrester, who had charge of the work, to either go down outside the tunnel and work, when the tunnel was filled with smoke from passing engines, or if they did not have work outside, to go down the ladder to the open tunnel below, or stand still where they were and wait until the smoke cleared out. Plaintiff admitted knowing these instructions (R., p. 78), and he admittedthat it had been the practice of the men working on the platform to either go down the ladder and wait until the smoke cleared out, or if they were wet and it was cold below, to stand still until they could see to work (R., pp. 36, 78). He did not have any instructions to continue work while the tunnel was filled with smoke, and if he saw fit to do so and walked

toward this open end of the platform, knowing its condition as well or better than the defendants knew it, then certainly at common law he assumed all the risks of doing so, and his negligence was the proximate cause of his injury.

> "The injured servant cannot maintain an action unless he shows that the defect alleged was the proximate cause of his injury. Thus, he cannot recover * * * if the defect in question would not have caused any injury, if he had not himself been guilty of negligence in dealing with the defective appliance."
>
> *Labbatt's Master & Servant,* 2nd Ed., Vol. 5, Sec. 1670.

> "There exists an exception to the general rule that an employee may assume that reasonable care will be observed by his employer for his protection, which is that where a defect in machinery is known to an employee or is so patent and obvious as to be readily observable while engaged in his work, and he continues in the use and operation thereof notwithstanding the defect, he assumes the risk and hazard attending such use. The reason for the exception is that having such knowledge or possessed of the ready means of acquiring it and shutting his eyes to palpable conditions, he elects to engage in the service, and therefore to undergo the hazard on his own account."
>
> *Katalla Company vs. Rones,* 186 Fed. 30.

> "At common law a servant assumes the general risks of his employment, but he is not obliged to pass

upon the methods chosen by his employer in discharging the latter's duty to provide suitbale appliances and a safe place to work, and he does not assume the risk of the employer's negligence in performing such duty. This rule is subject to the exception, that, where a defect is known to the employee, or is so patent as to be readily observed by him, he cannot continue to use the defective appliance, in the face of knowledge and without objection, without himself assuming the hazard incident to such situation. If a defect is so plainly observable that the servant may be presumed to know its existence, and he continues in the master's employment, without objection, he is said to have made his election to thus continue, notwithstanding the master's neglect, and in such a case he cannot reocver."

Texas & R. R. Co. vs. Harvey, U. S. Sup. Ct. Dec., May 15, 1913, page 5518.

"The workman assumes those risks of danger which are ordinarily incident to the work in which he is engaged, and those which are open and obvious to the senses, and which are known to him, if he continues in the occupation."

Pacific T. & T. Co. vs. Starr, supra.

The case of *Faber vs. C. Reiss Coal Company,* 102 N. W. 1049, decided by the Supreme Court of Wisconsin, is peculiarly in point. There the plaintiff was injured by falling offi a platform upon which he was working, and the grounds of negligence charged were the failure of the employer to furnish a guard or rail on this platform, or sufficiently light it. The case is not as strong in favor

of the employer as is the case at bar, for the reason that the platform was narrow, and plaintiff had only been working on it an hour or so before he fell. However, it appeared that he knew the exact condition of the platform, and he fell off the edge while walking across the platform to get a drink. The case was submitted to the jury, and special findings were made to the effect that defendant was guilty of a want of ordinary care and prudence in failing to properly light the premises, and in failing to erect a barrier or railing at the point where plaintiff fell, and that this negligence was the proximate cause of plaintiff's injuries. The jury also found that plaintiff's injuries were not occasioned by an accident not occurring by reason of the negligence of either party, that the platform was not a reasonably safe place for plaintiff to perform his work, and that there was no want of ordinary care on the part of plaintiff which contributed to his injuries. Judgment was rendered in favor of plaintiff on this verdict, but the same was reversed and a new trial granted upon the ground that plaintiff assumed the risks of working upon this platform, which were obvious to him. We would respectfully call the court's attention to the discussion of the law on this question by the court in this case.

The case of *Byers vs. Youghiogheny & Ohio Coal Co.*, 79 Atlantic, 157, was an action for personal injuries by an employee, sustained from a fall from an unguarded

platform or stairway in the place where plaintiff was required to work. The lower court granted a non-suit upon plaintiff's evidence, and the Supreme Court of Pennsylvania, after discussing the evidence said:

> "No argument is needed to show that he assumed the risk of his employment,"

and affirmed the lower court.

> "Plaintiff knew the very danger that he complains of as constituting the negligence of defendant, and it must be held as a matter of law that he assumed the risk."

> *Elmer vs. Mutual Steamship Co.,* 130 N. W. 1104 (Minn.).

An employee assumes the risk incident to openings in the floor of the room in which he is at work, which are so obvious as to be easily seen by any one working in the room. "He assumed by his contract any risk attendant upon their forming a part of the works of his employer."

> *Connolly vs. Furbush,* 87 N. E. 469 (Mass.).

> "This hole was plainly to be seen and was one of the obvious risks of the business as carried on by the defendant, and we think that the defendant could not reasonably have anticipated the need of any information as to its existence, or the need of any warning to be careful. It was exactly what might be expected to exist in such a floor in such a room used for such purposes as was this room. There

was no evidence of any change since the plaintiff entered into the defendant's employment."

Held, that the employee assumed the risk of injury from this hole.

Pearson vs. Boston Gas Light Co., 87 N. E. 571 (Mass.).

See also

Williams vs. Bunker Hill & S. Mine & C. Co., 200 Fed. 211;

C. B. & Q. R. Co. vs. Shalstrum, 195 Fed. 725;

Anthony vs. Leeret, supra.

Smith vs. Lincoln, 84 N. E. 498 (Mass.);

Feely vs. Pearson Cordage Co., 37 N. E. 268 (Mass.);

McCafferty vs. Cleansing Co., 80 N. E. 460 (Mass.);

Hoard vs. Blackstone Manufacturing Co., 58 N. E. 180 (Mass.);

Wanamaker vs. Burke, 2 Atlantic 500 (Penn.);

Oleksy vs. Midland Linseed Co., 168 Fed. 896.

NEITHER DEFENDANT IS LIABLE UNDER THE FEDERAL STATUTE.

Section 2 of the Federal Statute provides that a common carrier by railroad in a Territory, shall be liable in damages to a person in its employ for injury "resulting in whole or in part, from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, tracks, roadbed, works, boats, wharves, or other equipment."

As we have already shown, in order to maintain an action under this statute, it must first appear that the employer is a common carrier by railroad in the Territory, and we have shown that the evidence conclusively proves that the Katalla Company was not such common carrier, and that the Copper River & Northwestern Railway Company was such common carrier. It must next appear that the injured party was employed by such common carrier, and we think the evidence conclusively shows that plaintiff was not employed by the Copper River & Northwestern Railway Company, but was employed by the Katalla Company, and for these reasons, he could not maintain an action against either Company under this statute.

But even if we are not correct in this contention, nevertheless, we think that this action cannot be maintained under this statute, and the evidence in this case. The statute gives a right of action only where the injury results in whole or in part, from the "negligence" of the officers, agents or employees of the carrier, or by reason of a defect or insufficiency "due to its negligence," in the appliances, etc., of the carrier. In this case, plaintiff's injuries were not due to the negligence of any of the officers, agents or employees of either of the defendants. There is no statute imposing any duty on the part of an employer in Alaska, to guard or light the edge of a platform like the one in question, and in the absence of such a statute, the measure of defendants' duty in this particular, and therefore, of their negligence, is the rule at common law. It they would not be negligent at common law in failing to guard or light this end of the platform, then they would not be negligent under the statute, and this action could be maintained thereunder. We do not think this contention could be doubted, and if our argument that there was no negligence on the part of defendants at common law is correct, then of course, in no event could this action be maintained under the Federal statute.

But if we are not correct in this contention, we still contend that the action cannot be maintained under this statute. Section 3 of the Federal Act takes away the

defense of contributory negligence, except that it permits the damages to be diminished in proportion to the amount of negligence attributable to the employee, and provides that the employee shall not be guilty of contributory negligence *where any statute enacted for the safety of employees has contributed to his injury.* By the term "statute" is clearly meant any Federal statute.

Horton vs. Seaboard Air Line R. Co., 78 S. E. 494 (N. C.).

There was no statute which required defendants to guard the end of this platform by rail or light, therefore, under the provisions of Section 3 of the Act of 1908, plaintiff's contributory negligence was a defense to the extent his negligence contributed thereto. We think the court will be satisfied under the undisputed testimony in the case that plaintiff's negligence was the sole cause of his injury, and in such case, no recovery could be had under the statute.

But we do not think a recovery could be had under the statute for another reason. Section 4 of the Act of 1908, provides that in an action brought under the provisions of that Act, the "employee shall not be held to have assumed the risks of his employment, *in any case where violation by such common carrier of any statute enacted for the safety of employees, contributed to the injury or death of such employee.*" The court will note that Congress has recognized in these two sections the

clear distinction between contributory negligence and assumption of risk. It has taken away the defense of contributory negligence entirely, except that the employee's damages shall be diminished in proportion to the amount his negligence contributed thereto. But the statute has taken away the defense of assumption of risk only where the carrier has violated some statute enacted for the safety of the employees, which violation contributed to the injury.

This statute being in derogation of common law, must be strictly construed, and the court cannot read into the statute anything not clearly within its express terms. The rule o fassumption of risk has its basis in the principles of the common law, and depends for its existence upon the relation of employer and employee existing between the parties. While some courts base the rule upon the mixim, "*volenti non fit injuria,*" the free translation of which is that he who prefers to remain in the presence of an obvious or manifest danger cannot recover for injuries resluting therefrom, other courts base the defense upon the contract of employment between the parties.

However, we do not think it necessary in this case to discuss whether the doctrine of assumption of rick is based upon contract, or the maxim "*volenti non fit injuria,*" although we think this court is committed to the view that the defense is based upon contract.

Welsh vs. Barber Asphalt Paving Co., 167 Fed. 465.

But whether arising from contract or based on the mixim, we think it makes no difference in this case. If based upon contract, then the effect of the contract between the parties was that plaintiff contracted to do his work with reference to the unguarded and unlighted condition of the end of this platform, which he well knew, and which he contracted should not be negligence on the part of his employer if left in this condition. On the other hand, if the defense is based on the maxim, then it clearly appears that he voluntarily continued in his employment in the face of the well-known, unguarded and unlighted condition of the end of the platform, and as he made no complaint of this condition, and never requested that a guard or light be placed there, and was never promised that there should be, he willingly assumed all the risk of injury because of the condition of the place where he was to do his work.

The Supreme Court of Iowa, in the case of *Scott vs. C. R. I. & P. R. Co.,* 141 N. W. 1065, clearly recognized that the defense of assumption of risk in the absence of a statute applying, is not taken away by the Federal Employer's Liability Act.

We think the decision of the Supreme Court of the United States in the case of *Texas & P. R. Co. vs. Harvey, supra,* also sustaines this contention.

This is also recognized in the decision of the Circuit Court of Appeals for the First Circuit, in the case of *Boston & M. R. Co. vs. Benson,* 205 Fed. 876.

The Supreme Court in the *Second Employer's Liability* cases, 223 U. S. 1, also recognizes that this statute does not take away this defense, except where the carrier has violated some express statute enacted for the safety of the employee, which violation contributed to the injury.

When we consider that Congress, in the Second Employers' Liability Act, undertook to cover the entire field so far as was desired, of the relationship between carrier and employee, and in doing so took occasion to expressly designate the particular risks of injury which the employee should not assume, it logically follows that Congress meant to declare that the common law still remains in existence as to all other cases where the defense would be available in the absence of this statute. It cannot be claimed that Congress intended to repeal the entire common law in relation to assumption of risk, and unless it did so, the common law, except as modified by the express terms of Section 4 of the Act is still in force.

The Supreme Court of Idaho, in the case of *Neil vs. Idaho & W. N. R. Co.,* 125 Pac. 331, 335, speaking through Mr. Justice Sullivan says:

> "1. We will first determine whether said Act of Congress is applicable to the facts of this case.

> "That Act of Congress refers only to the interstate commerce, abrogates the fellow-servant rule, extends the carrier's liability to cases of injury and death, and restricts the defense of contributory negligence and assumption of risk."

The learned judge, at page 336, indicates in what manner the defense of assumption of risk has been restricted, saying:

> "Under the provisions of Section 4 of said Act, it is provided that the employee shall not be held to assume the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of the employees contributed to the death or injury of such employee, and, as it is not claimed in this case that the company had violated any statute enacted for the safety of employees the defense of assumption of risk remains as at the common law."

The Supreme Court of Texas, in the case of *Freeman, Receiver vs. Powell*, 144 S. W. 1033 (decided February 3, 1912), in which Mr. Justice Conner, speaking for the court, after quoting Section 4 of the Act of April 22, 1908, said:

> "It thus appears that under the federal statute a complaining employee to whom the Act applies is not relieved from the operation of the ordinary rule of assumed risk, except in cases where there is a violation by the carrier of some statute enacted for the safety of an employee which has contributed to his injury or death, and of this there is no contention in this suit."

It would seem to us from the foregoing authorities and a plain reading of the statute, that the plaintiff in this case, knowing the exact condition of the platform upon which he was working, and its unguarded and unlighted end, toward which he walked, and being a man of full age and in possession of all his faculties, at common law assumed the risk of injury because of the condition of the platform, and also any risk of walking toward the platform with only the hand lantern which had been furnished him; and that the defendants, under these circumstances, could not in any event be made to respond for his injuries; that the rule of common law still obtains so far as this case is concerned, and has not been abrogated by any federal statute, and it therefore follows that the defense of assumption of risk is available to the defendants in this case, and is a complete bar to any recovery by plaintiffs.

ERRORS IN INSTRUCTIONS GIVEN AND REFUSED.

Errors are assigned to the giving of certain instructions, and to the refusal to give certain instructions requested by defendants, which errors are con covered by the foregoing argument.

The Court instructed the jury as follows:

> "You are instructed that the rule of law is that between master and servant, the master is liable for all accidents occurring in the course of the employment, which are not induced by the carelessness or improper conduct of the employee or servant."
>
> "In other words, the master is bound to use reasonable care and diligence to prevent accident or injury, and if he does not he will be responsible for the damages, unless the servant assumed the risk or contributed to the injury through his own negligence, or the negligence of a fellow-servant."
> "As between master and servant negligence should be measured by the character and risk of the business engaged in, and the degree of care of both master and servant is higher when the lives and limbs are endangered than in ordinary cases."

Assignment of Errors Nos. XII, XIII, XIV (R., pp. 223-224).

It would seem to us that these instructions were clearly erroneous. It was certainly error to intsruct the

jury that the master is liable for all accidents occurring in the course of the employment, which are not induced by the carelessness or improper conduct of the employee; and we do not think the qualification which followed, to the effect that the master is bound to use reasonable care and diligence to *prevent accidents or injury,* and would be liable if he did not do so, unless the servant assumed the risk or contributed to his injruy, or the same was caused by the negligence of a fellow-servant, took away the vice of the former instruction or correctly stated the rule of law to the jury.

The instruction should have been that the defendants, if they were the employers in this case, were required to use reasonable care and prudence to furnish plaintiff a reasonably safe place in which to do his work, and that a failure in this regard would render the defendant liable at common law, unless plaintiff was guilty of such contributory negligence or assumed the risks, as to bar a right of recovery. A master is not bound to use reasonable care and diligence "to prevent accident or injury," and such a rule would impose upon the master a greater responsibility in this case than is imposed either by common law or the federal statute.

The instruction that the degree of care required of the master where lives and limbs are endangered is higher thain in ordinary cases, is not proper under the facts in this case, and this instruction, given with the other in-

structions referred to, gave the jury to understand that where it is possible for an employee to sustain injury to his limbs or his life is endangered, the master is bound to see that he was not so injured, making the master practically an insurer against such injury; when under the well settled rules of law the master was only required to use reasonable care and prudence to furnish a reasonably safe place for plaintiff to do the work he was required to do in this case.

The Court also instructed the jury as follows:

> "All acts and duties which the master is bound to perform toward his employees and servants, which he delegated the performance of to others as an agent, then the agent occupies the same place as the master and the master is deemed present and liable for the manner in which such duties are performed."

Assignment of Errors No. XV (R., pp. 224-225).

This is not a correct statement of the law, because it is only those non-delegible duties which the master is bound to perform, which he cannot delegate to an agent and escape liability for the failure of such agent to perform such duty. There was no evidence in the case that any fellow-servant or vice-principal had neglected to furnish a proper light or guard for the platform in question, and this instruction had no place in the case, but by giving it, the jury would understand that the defend-

ants were negligent in this case in failing to properly light and guard the edge of the platform.

The Court also instructed the jury as follows:

> "You are instructed that the servant does not assume the extraordinary or unusual risks of the employment, but on accepting employment he does assume all the ordinary and usual risks and perils incident thereto, whether it be dangerous or otherwise, and also all risks which he knew of or may have known in the exercise of reasonable care, except that he does not assume such risks as are created by the master's negligence.
>
> Assignment of Errors No. XVII (R., p. 225).

This instruction is certainly not correct. A servant may assume extraordinary or unusual risks of which he knows, unless some statute provides otherwise. He may also assume risks created by the master's negligence, of which he is aware, unless some statute provides that he shall not be deemed to have assumed such negligent acts.

> *Katalla Company vs. Rones,* 186 Fed. 30;
> *Pacific T. & T. Co. vs. Starr,* 206 Fed. 157.

The Court also instructed the jury as follows:

> "Where the negligence or want of ordinary care and caution of a servant so far contributed to his injury that it would not have occurred but for such negligence, he cannot as a rule recover. But if the injury is caused by the gross or wilful negligence of the master or his agents, or if the consequences of the servant's negligence might have been

avoided by the exercise of ordinary and reasonable care on the part of the master or his agents, then the servant could recover though himself negligent."

Assignment of Errors No. XVIII (R., pp. 225-226).

There was no evidence in this case of any "gross or wilful negligence" on the part of defendants, or their agents, and it is certainly not the law that if the consequences of the servant's negligence might have been avoided by the exercise of ordinary and reasonable care on the part of the master, or his servant, then the servant could recover although he was himself negligent. Such a rule of law would entirely destroy the defenses of contributory negligence and assumption of risk.

The Court also instructed the jury as follows:

"All servants engaged in the same common work, without any dependence upon or relation to each other, except as co-laborers without rank, under the direction and management of the master, or his agents, are fellow-servants."

Assignment of Errors No. XIX (R., p. 226).

This is not the correct rule of law in Federal courts. Under Federal decisions, neither mere superiority of rank nor right of one servant to exercise control over another will constitute the former a vice-principal of the corporation master, with respect to the latter, but it must be shown that he is intrusted by the master with departmental control.

Moss vs. Gulf Compress Co., 202 Fed. 657 (C. C. A. 5);

Alaska Gold Min. Co. vs. Musit, 114 Fed. 66 (C. C. A. 9).

The Court also instructed the jury as follows:

"To render the master not liable for an injury to a servant caused by the negligence of a fellow-servant, it must be shown that the injury directly resulted by reason of such fellow-servant's negligence, that is, that it was the proximate cause thereof and not the negligence of the master."

Assignment of Errors No. XX (R., p. 226).

This instruction also takes away the defense of contributory negligence and assumption of risk, and in effect, told the jury that if the injury was proximately caused by the negligence of a fellow-servant, then the employee could recover even though he were guilty of contributory negligence or assumption of risk.

The Court instructed the jury as follows:

"This is your last case at this term of court, of which you have had several on the same general subject of personal injuires."

Assignment of Errors No. XXII (R., p. 227).

This instruction impliedly told the jury that they were to take into consideration in this case instructions which the court had given them in previous personal injury trials during that term of court. What those instructions were, of course, we do not know, but it cer-

tainly was not proper for the court to tell the jury in effect that they might consider any instructions which he had given in any other trials, but he was bound to instruct the jury on all the law of the case at issue, as though they had never received any instructions in similar cases before.

Defendants requested the Court to give to the jury the following instruction, which was refused:

> "You are instructed that if you find from the evidence that the plaintiff had been warned that when trains were passing through the tunnel that he should quit work and either come down from the roof of the tunnel or not move around and he failed or refused to obey said orders, and he would not have been injured if he had obeyed said orders and he was injured by refusing to obey said order, then you are instructed that the plaintiff cannot recover in this action."
>
> Assignment of Errors No. XXIV (R., pp. 228-229).

Certainly this instruction was correct, because there was evidence in the case tending to show that plaintiff had received such instructions, and that he violated them, thereby causing his injury; and certainly he could not recover against defendants under either the common law or the statute, if his injuries resulted from a violation of positive instructions given him by defendants as to how he should do his work.

Defendants requested the following instruction, which was refused:

> "You are instructed that the plaintiff is presumed to know the dangers that he has an opportuniy to observe and that he must inform himself of open, obvious risks and if he does not do this and is injured by reason of his failure to do so, then he can not recover."
>
> Assignment of Errors No. XXVI (R., p. 229).

We think this instruction was proper, whether recovery could be had under the common law or the statute. It was certainly correct if the action is based on the common law, and as the Court instructed the jruy as to the law applicable if his recovery was had under the common law, this instruction should have been given in any event.

We think under the authorities already cited, the instruction was also proper even if the action was based on the Federal Statute.

Defendants also requested the Court to give the jury the following instruction, which was refused:

> "You are instructed that if the plaintiff continued working with knowledge actual or constructive of dangers which an ordinary prudent man would refuse to subject himself to, he is guilty of contributory negligence and cannot recover."
>
> Assignment of Errors No. XXVII (R., p. 230).

We think this instruction should hvae been given for the reasons last stated.

Defendants also requested the Court to give the jury the following instructions, each of which requests was refused:

> "You are instructed that plaintiff has admitted in this case that he was working as a carpenter at the time of his injury and that he was familiar with and knew that at the place where he fell over had no guard-rail across it, which fact was known to him for several days prior to the accident and at the time of the accident, therefore you are instructed that if the plaintiff continued working with knowledge of these facts as he has testified that he did have, and if you further find that he knew or ought to have known as a reasonably prudent man, that it was dangerous not to have a guard-rail at this place ,and no one in authority had promised to have a guard-rail or other protection at this place, then you are instructed the plaintiff assumed the risks incident to no guard-rail being at the point or place where he fell."

> "You are instructed that plaintiff has admitted in this case that he was working as a carpenter at the time of his injury and that he was familiar with and knew that at the place where he fell over had no guard-rail across it, which fact was known to him for several days prior to the accident, and at the time of the accident, therefore you are instructed that if the plaintiff continued working with knowledge of these facts as he has testified that he did have, and if you further find that he knew or ought to have known as a reasonably prudent man, that it was dangerous not to have a guard-rail at this place, and no one in au-

thority had promised to have a guard-rail or other protection at this place, then you are instructed that the plaintiff assumed the risks incident to no guard-rail being at the point or place where he fell and can not recover in this case."

"You are instructed that plaintiff has admitted that he knew at the time of his accident, and for several days prior thereto, that there was no guard-rail or other protection at the point or place where he fell, and has admitted that he knew that trains were runing through this tunnel and that smoke from the engines surrounded the place where he was working, and that while he was surrounded by smoke from the engine he voluntarily continued working when he knew that he could not see where he was walking and that he did porceed and while walking stepped off of the point or place where he claims there was no guard-rail; therefore, you are instructed that the plaintiff assumed the risks of walking or trying to work at that time."

"You are instructed that plaintiff has admitted that he knew at the time of his accident, and for several days prior thereto, that there was no guard-rail or other protection at the point or place where he fell, and has admitted that he knew that trains were runing through this tunnel and that smoke from the engines surrounded the place where he was working, and that while he was surrounded by smoke from the engine he voluntarily continued working when he knew that he could not see where he was walking and that he did porceed and while walking stepped off of the point or place where he claims there was no guard-rail; therefore, you are instructed that the plaintiff asumed the risks of walking or trying to

work at that time, and he is guilty of contributory negligence."

"You are instructed that plaintiff has admitted that he knew at the time of his accident, and for several days prior thereto, that there was no guard-rail or other protection at the point or place where he fell, and has admitted that he knew that trains were runing through this tunnel and that smoke from the engines surrounded the place where he was working, and that while he was surrounded by smoke from the engine he voluntarily continued working when he knew that he could not see where he was walking and that he did porceed and while walking stepped off of the point or place where he claims there was no guard-rail; therefore, you are instructed that the plaintiff asumed the risks of walking or trying to work at that time, and he cannot recover in this case."

Assignment of Errors, XXIX, XXX, XXXI, XXXII, XXXIII (R., pp. 230-234).

We think each of these instructions was proper and should have been given for the reasons already stated.

For the reasons hereinbefore stated, we respectfully submit that the judgment of the trial court should be reversed, and the action dismissed, or a new trial granted.

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No. 2300

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

COPPER RIVER & NORTHWESTERN RAILWAY COMPANY (a corporation), and KATALLA COMPANY (a corporation),

Plaintiffs in Error,

vs.

JAMES HENEY,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

Statement of the Case.

In this brief the parties will be designated as in the Court below.

The plaintiff, James Heney, sued to recover damages for personal injuries suffered by a fall through an open hatchway in a platform to the ground twenty-one feet below, in a tunnel on the line of the Copper River & Northwestern Railway Company near Chitina, Alaska. He alleged that he was working in the nominal employ of the Katalla

Company, one of the defendants herein, but in reality the work was done for the Copper River & Northwestern Railway Company, the other defendant, of which the Katalla Company was alleged to be an agency. He alleged negligence on the part of the defendants in not having the tunnel better lighted, or the hatch in some way safeguarded. The defendants answered separately, the Copper River & Northwestern Railway Company denying all the allegations of the complaint except its corporate existence, and the Katalla Company denying all allegations except its corporate existence and that it was doing business in Alaska. They also pleaded the affirmative defense of contributory negligence, assumption of risk and negligence of a fellow servant.

The case was tried before a jury and a verdict rendered for $2125.00 in favor of the plaintiff, and the Court entered judgment for that amount. The defendants then sued out this writ of error.

Assignment of Errors.

Thirty-seven errors by the Court are assigned by the defendants, as plaintiffs in error, as grounds for reversal of the judgment. Many of these assignments are practically repetitions and are merely efforts to attain the same point by stating identical objections or arguments in different ways. The real assignments of error appear to counsel for

plaintiff, defendant in error, to be fairly stated as follows:

1. The Court erred in the admission of evidence to show the lighting of the tunnel prior to the day of plaintiff's injury, and the advantage of a danger light at the place where the mishap occurred.

2. The Court erred in admitting certain testimony to show that both defendants were common carriers.

3. The Court erred in refusing to direct a verdict for the defendants.

4. The Court erred in certain instructions to the jury.

5. The Court erred in refusing instructions asked by the defendants.

Combining the errors into these groups counsel for the plaintiff respectfully submits the following

Argument.

The defense, aside from attempted evasions of liability and responsibility, were contributory negligence and assumption of risk. Negligence of a fellow servant was pleaded, but no evidence was offered on that line of defense. Plaintiff contended that the necessary risks of the employment were slight, and that his own negligence, if any, was slight; that the accident could not have happened but for the negligence of the defendant corporations; that if the defendants had safeguarded the hatch through which he fell, either by a railing or

by a light, or if the whole tunnel had been well lighted, all chance for the accident would have been avoided. To support his contention, plaintiff offered evidence which was hardly disputed, of the following facts and circumstances:

That the tunnel was well lighted for several weeks, while plaintiff was working in it, by two powerful acetylene lights; that these were removed, one at a time, and, after the second was removed, gasoline torches were used, which gave a fair light. That, for two or three days, up to and including the day of the accident, only hand lanterns were supplied. Of these, on that day, the four men working on the platform had only three. While the tunnel was lighted by large lights, the hatch was easily visible (R. 31-32-39-99). When reduced to three small lanterns, the men could see it only by holding a lantern close to it (R. 39). When the tunnel was filled with smoke after the passing of an engine they could scarcely see anything, a lantern merely showing a faint red glow, without radiating light (R. 39-104-105-109-110-111-129-130). No effort was made to furnish better light, or even more lanterns, although the men asked for them (R. 102). No railing was put along the hatch, and no planks supplied to cover it (R. 40-116-117). This situation had existed for two or three days (R. 32-39-40-99-134-5). A train went through just prior to Heney's fall, the engine leaving a dense volume of smoke and gas in the tunnel, confusing the faculties (R. 44-103-104-128). Heney fell

through the hatch while groping with a lantern in his hand.

Error is assigned in the admission of testimony to show that a few days prior to the accident the tunnel had been well lighted, and that even after the workmen were reduced to small hand lanterns to work by, if an additional small light had been placed at the edge of the hatch, its location would have been sufficiently indicated to prevent anyone from falling into it.

Testimony on both of these points was clearly admissible. It is the duty of an employer, when he changes the conditions surrounding work which involves any hazard, to take reasonable precautions for the safety of employees applicable to the changed conditions. It seems needless to cite authorities on this rule, but the following is given as decisive, from Kreigh v. Westinghouse & Co., 214 U. S. 256:

> "Nevertheless, the duty of providing a reasonably safe place for the carrying on of the work is a continuing one, and is discharged only when the master furnishes and maintains a place of that character."

As late as Santa Fe & Pacific R. R. Co. v. Holmes, 202 U. S. 438, it was declared:

> "The duty is a continuing one and must be exercised whenever circumstances demand it.
>
> "Where workmen are engaged in a business, more or less dangerous, it is the duty of the master to exercise reasonable care for the safety of his employees, and not to expose them

> to the danger of being hurt or injured by the use of a dangerous appliance or unsafe place to work, where it is only a matter of using due skill and care to make the place and appliances safe."
>
> Choctaw, Oklahoma etc. R. R. v. McDade, 191 U. S. 64, 66,

and cases there cited.

The rule is more tersely stated in Santa Fe Pacific Railroad Company v. Holmes, 202 U. S. 438, as follows:

> "The duty of the master to furnish safe places for employees to work in and safe appliances to work with is a continuing one, to be exercised wherever circumstances require it. * * *"

When the defendants took out the lights, which lighted the tunnel like a city street (R. 31-99), and gave four men only three small lanterns for their work, conditions were certainly so changed that the continuing duty to take reasonable precautions for the safety of the employees required that some special safeguard or danger signal be placed at the hatch to give constant warning of its proximity. Roadmaster Forrester, who was in charge of the work when the accident occurred, testified on cross-examination that a cheap railing or small lantern could easily have been placed at the edge of the hatch, and "it would have been a precaution, yes, sir" (R. 167).

The issue being that of negligence chargeable to either party or both, it was proper to admit evi-

dence of changed conditions or of possible precautions, to aid in fixing responsibility:

> "In respect to the assumption, by a servant, of extraordinary risks, a risk becomes transformed from an ordinary one to an extraordinary risk, whenever, among other conditions, the master's negligence contributes an added hazard to the situation in which the servant is placed; the word 'extraordinary' not being used to denote magnitude, or as a mark of degree, but to indicate that the risk is one which lies outside of the sphere of the normal."
>
> Baer v. Baird Mach. Co., 79 Atl. 673 (Conn.).

In considering these two assignments of error, it is well to read a little more testimony along with that quoted by defendants.

See, testimony of W. H. Slimpert, page 102 of the record:

> "Q. After you got down to hand lanterns, did you ever ask for any other lights—speak to anybody in authority about it?
>
> A. Well, we spoke several times to Mr. Forrester, I did, saying, we could use more lights.
>
> Q. Were any other lights given you?
>
> A. Not at that time. Later, after this, Mr. Forrester and I went down and took a headlight off one of those dinky engines that sat down by the depot. We did take it off and use it in the tunnel."

Clearly, no adequate effort was made by the companies to meet added hazards. They were culpably negligent.

> "If negligence of the master in failing to provide and maintain a safe place to work con-

tributed to the injury received by the plaintiff, the master would be liable, notwithstanding the concurring negligence of those performing the work."

Grand Trunk R. R. Co. v. Cummings, 106 U. S. 700;

Deserant v. Cerillos Coal Railroad Company, 178 U. S. 409, 420, and cases there cited;

Kreigh v. Westinghouse & Co., supra.

The third assignment of error criticises the statement of the Court that instructions of a foreman would not be binding on the plaintiff unless the jury found that he received them. We submit that the Court merely stated the law.

The fourth and fifth assignments of error refer to the reading to the jury of headings of waybills and bills of lading identified by witnesses, as used in freight shipments on the railroad, for the purpose of showing that both defendants were doing business as common carriers and that the Katalla Company was doing business for the Copper River & Northwestern, and was employing plaintiff in that business at the time he was hurt.

Printed matter is admissible as evidence of its purpose and use if sufficiently identified.

Wigmore on Evidence, Vol. III., Sec. 2150.

In this case the bill of lading was identified by M. V. Lattin, a station agent of the railway company (R. 150-151). Lattin also testified as to the passenger tickets (R. 151), "They have read the

Katalla Company for, I believe, up six months ago I got a Northwestern ticket then." Lattin further testified concerning the way bills, that, until a few months before the trial of this case, which trial was more than a year after the injury complained of, the form read, "The Katalla Company, Constructing and Operating the Copper River & Northwestern Railway Company."

Counsel for defendants also objects (sixth assignment of error) to the testimony of the deputy clerk of the Court, T. S. Scott, as to the incorporation papers of the Katalla Company on file in the clerk's office, which were offered and read but not made exhibits. This testimony also tended to show, what was difficult to prove except by piecemeal because of the evasions of defendants, that both defendants were common carriers, and that the Katalla Company did business over the Copper River Company's tracks.

Here let it be noted that the defendant corporations made an evasive defense throughout. They began by denying under oath everything alleged in plaintiff's complaint, except that each admitted its own corporate existence and the Katalla Company admitted that it was doing business in Alaska. Each company, therefore, made a verified denial of the corporate existence of the other, and denied that the railway company owned its own line of railroad, and denied that said railway company was doing business in Alaska. These sworn denials compelled plaintiff to offer evidence

of notorious facts that defendants made no effort to controvert. Plaintiff alleged and proved to the satisfaction of Court and jury that he was working for both corporations and that both were common carriers; the Katalla Company operating over the Copper River tracks. Both defendants sought to evade liability by shifting responsibility. This evasive defense runs all through the evidence, but is most happily exemplified by an abstract from the cross-examination of J. W. Forrester, roadmaster of the railway company, by counsel for the defendants, when he had been called as a witness for the plaintiff. If any doubt is left after all the other evidence as to either defendant corporations having been a common carrier at the time of the plaintiff's injury and for a long time prior thereto, the doubt is certainly removed by this testimony. Questions by Mr. Boyer, attorney for the defense (R. 148-9-50):

> "Q. Now, as a matter of fact, do you know anything in regard to the business relations or connections between the Katalla Company and the Copper River & Northwestern Railway Co.?
>
> A. I do not.
>
> Q. You have never seen any of their contracts?
>
> A. No, sir.
>
> Q. Do you, as a matter of fact, know whether the Katalla Company is operating this road at the present time or not, or if the Copper River & Northwestern Co. is operating the road at this time?
>
> A. I don't know, no sir. I couldn't testify.

Q. You know there are trains running up and down this road?

A. Yes, sir.

Q. You know that freight and passengers are being carried up and down this road?

A. Yes, sir.

Q. You don't know who has the license to operate this road?

A. No, sir.

Q. I will ask you if you know that the articles of incorporation of the Katalla Company provide that it can do a common carrier business?

A. I don't know anything about it.

Q. I will ask you if you don't know or if you do know if the Copper River & Northwestern Railway Co. has a license to do a common carrier business over this particular line?

A. I don't know whether they have or not.

Q. I will ask you from whom you were drawing your checks at that time?

A. The Katalla Company, to the best of my recollection—I couldn't say positively.

Q. On your direct examination, Mr. Ritchie asked you what was your position with the Copper River & Northwestern Railway Co. at that time, and you stated you were resident engineer—do you know if you were resident engineer for the Katalla Company or for the Copper River & Northwestern Railway Co. at that time?

A. I was resident engineer on the railroad; that is all I know about it.

Q. You don't know, as a matter of fact, whom you were working for?

A. No, sir; I do not.

Q. Mr. Ritchie asked you whether the railroad company was doing a common carrier business and I believe you answered in the affirmative. I will ask you if you knew or if

you know now whether it was the Katalla Company that was doing a common carrier business or if it was the Copper River & Northwestern Railway Co. that was doing a common carrier business?

A. No, sir; I don't know what company it is.

Q. It wasn't your intention to tell the jury you knew which one was, or if either was doing a common carrier business?

A. I know the railroad handles freight and passengers—I don't know which company it is.

Q. That freight is carried up on trains?

A. Yes, sir.

Q. But whether it is a company, corporation, individual, or what it is, you don't know?

A. No, sir."

Comment on the foregoing testimony would burden the patience of the Court.

Assignment number seven assigns error in denying a motion to quash service of summons on the Katalla Company. As that defendant immediately answered, it is hardly needful to say it thereby waived objection to the route by which it arrived in Court.

Assignment number eight assigns error in denying a motion to make more definite and certain and a motion to strike. This motion, apparently, was directed against plaintiff's complaint, but was waived by pleading over, and is not printed in the record.

Assignment number nine assigns error in denying defendants' motions at the close of plaintiff's case for a nonsuit. That these were waived by de-

fendants' introduction of testimony in their own behalf, needs no citation of authority.

The tenth assignment of error goes to the Court's denial of defendants' motions at the close of all the testimony for a directed verdict, based on four grounds. The first ground urges that the Employers' Liability Acts take away the common law liability. The answer is, that those acts take away nothing from the common law liability, but simply add to it. No statute abrogates any part of the common law, except by express enactment or necessary implication. There is nothing in any of the Employers' Liability Acts which expressly or impliedly takes away the common law liability in this case.

It is further urged in this assignment that it was necessary for plaintiff to establish that both defendants were doing a common carrier business. This is untenable. It is only necessary to prove that either company was a common carrier to hold that company, and that both were common carriers to hold both, under the Employers' Liability Acts. But, in any case, if common law liability was established by the evidence, that liability would attach to the culpable defendant or defendants, regardless of the Employers' Liability Acts.

The second ground urged in this assignment of error is the averment that plaintiff failed to prove that he was working for the Katalla Company. He testified on cross-examination by counsel for the

Katalla Company that he was paid by the Katalla Company, as follows:

> "Q. You were drawing your salary from the Katalla Company, were you not?
> A. I had the Katalla Company's check" (R. 55).

This was not contradicted.

The third ground under this assignment refers to plaintiff's admissions as to his knowledge of conditions. These are to be considered with all the other circumstances of the case and left to the jury.

The fourth ground is a mere generality. All the questions of fact in the evidence were entitled to go to the jury under the rule laid down in Kreigh v. Westinghouse, supra, as follows:

> "Questions of negligence do not become questions of law to be decided by the Court, except where the facts are such that all reasonable men must draw the same conclusions from them, and the case is not to be withdrawn from the jury unless the conclusion follows as matter of law that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish."

Gardner v. Mich. Cent. R. R., 150 U. S. 348, 361.

To the same effect are:

Tex. & Pac. R. Co. v. Sweringen, 196 U. S. 51;

Schoeffler v. Nor. Pac. R. Co., 193 Fed. 627;

Chicago & E. R. Co. v. Ponn., 191 Fed. 682;

Katalla Co. v. Rones, 186 Fed. 30;

Northwestern Lumber Co. v. Cizen, 196 Fed. 454;

Republic Elevator Co. v. Lund et al, 196 Fed. 745;

C., M. & St. P. R. Co. v. Mills, 187 Fed. 800; and

Penn. R. Co. v. Forstal, 159 Fed. 893.

We submit without argument that there was no error in the instruction complained of in the eleventh assignment.

The instruction objected to in the twelfth assignment of error might be misleading if it were not qualified by the language immediately following, given in the thirteenth assignment of error. The two are in separate paragraphs in the record, but the Court was not responsible for that, as the instructions were given orally, as shown by the reporter's certificate on page 182 of the record. The second statement gives the law as it was before the Employers' Liability Acts. Under these laws, the statement is too favorable to the defendants, but the Court was then stating the common law. As this case is to be determined under both the common law and the statutes mentioned, the only error in these instructions which could be harmful, would be the statement of defenses which are taken away or modified by the statutes. The fellow servant rule is not an issue in this case except in the pleadings, and the issue of contributory negligence is limited to the extent of plaintiff's negligence by the Employers' Liability Acts.

Counsel for plaintiff submit without argument that the errors alleged in assignments numbered fifteen to twenty, inclusive, state the law, and that there is no error in any of them. The instructions regarding fellow servants were not necessary to this case.

In the twenty-first assignment of error, defendants object to the incorporation in the instructions of the Court of an extract from the Employers' Liability Acts. Inasmuch as counsel for the defense insisted throughout the trial that the action was subject to the provisions of those acts, exclusive of common law liability, and makes this point in numerous exceptions to the instructions, it is difficult to see on what ground defendants can object to a citation from the statute in question.

The statement of the Court assigned as error in the twenty-second assignment, though foreign to the case, was absolutely harmless.

Assignment number twenty-three complains of the refusal of the Court to give an instruction asked by the defendants regarding the proof of liability of one or both. This was fully covered in substance by the tenth instruction given by the Court.

The assignments of error numbered twenty-four to thirty-five, inclusive, except the twenty-eighth, are identical in substance, and raise practically the same contention as the motion for a directed verdict. The objection is to the refusal of the Court to instruct the jury in effect that if the plaintiff

was negligent he could not recover. The instructions asked and refused wholly ignore the question of the employer's negligence, and would exempt him from liability if the employee was negligent, or assumed any risk. The contention of defendants is wholly disposed of by the citations already given in discussing the motion for a directed verdict. This contention seeks to exempt the employer from all liability for his own negligence and lack of reasonable precaution for the safety of employees in any case where the element of assumption of risk or contributory negligence enters in any degree. This is not the law, and never was the law, even before the Employers' Liability Acts. Not only was the employer always held if he was guilty of gross negligence, but the employee has been excusable for negligent action under stress of circumstances if the master's gross negligence created the conditions which made the injury possible.

In Kane v. Northern Central Railway Company, 128 U. S. 91, a Pennsylvania case decided in 1888, a brakeman was injured in climbing down a freight car from which a step was missing. He knew the step was missing, but in haste to reach his post, there being a bitter winter storm blowing, he fell under the train and lost both legs. He admitted that he forgot about the missing step. The Circuit Court took the case from the jury on the ground of contributory negligence. The Supreme Court

reversed the judgment by a unanimous decision. In the opinion, Mr. Justice Harlan said:

> "It cannot be said that the plaintiff was guilty of contributory negligence in staying upon the train in the capacity of brakeman, after observing that a step was missing from one of the cars over which he might pass while discharging his duties. * * * But in determining whether an employee has recklessly exposed himself to peril, or failed to exercise the care for his personal safety that might be reasonably expected, regard must always be had to the exigencies of his position, indeed, to all the circumstances of the particular occasion. * * * In the case before us, the jury may, not unreasonably, have inferred from the evidence, that while the plaintiff was passing along the top of the cars, for the purpose of reaching his post, he was so blinded or confused by the darkness, snow and rain, or so effected by the severe cold, that he failed to observe, in time to protect himself, that the car from which he attempted to let himself down was the identical one which, during the previous part of the night, he had discovered to be without its full complement of steps."

In the case at bar, "the jury may, not unreasonably, have inferred from the evidence" that the cold weather, the darkness of the tunnel, and the strangulating smoke and gas, all combined to confuse plaintiff's mental faculties as well as to blur his vision, so that he was unable, momentarily, to exercise his ordinary perceptions. And the jury must have found, before finding the verdict, that the companies were grossly negligent in not taking

slight and inexpensive precautions to safeguard the hatch.

The twenty-eighth assignment of error criticises the refusal of the Court to instruct the jury that unless the Katalla Company was found to be a common carrier, plaintiff could not recover in this action. This proposition of law is so queer that it hardly deserves notice. Even if the Katalla Company was not a common carrier, it was subject to common law liability, and whether it was liable at all or not, the Copper River & Northwestern might be liable either under the statutes or the common law. The action might have been dismissed as to the Katalla Company without affecting the Copper River & Northwestern.

The errors assigned in the twenty-sixth assignment in refusing to instruct that plaintiff could not recover unless both defendants were found to be common carriers, and in the twenty-seventh in denying defendants' motion for a new trial and in entering judgment only raise points urged in other assignments and require no further discussion.

In conclusion, counsel for defendant in error respectfully submit that, on the whole record, no prejudicial error is shown that might possibly have harmed the plaintiffs in error. The issues were fairly and properly submitted to the jury, and certainly sufficient evidence was introduced to justify the verdict. The jury, in Alaska, are the exclusive judges of the evidence, of its weight, and

of the credibility of the witnesses. They returned a verdict for the plaintiff, which was a finding that the defendants were guilty of actionable negligence and that the plaintiff's right to recovery was not defeated by an assumption of risk or contributory negligence on his part.

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